

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY VELEZ, et al.,

Individually and on Behalf of Others Similarly
Situated,

Plaintiffs,

-against-

NOVARTIS PHARMACEUTICALS
CORPORATION,

Defendant.

Case No. 04 Civ. 09194 (CM)

**NOVARTIS PHARMACEUTICALS CORPORATION'S
MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* TO
PRECLUDE EVIDENCE OR ARGUMENT RE AFTER-ACQUIRED EVIDENCE**

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A. **Introduction**

Plaintiffs' Motion seeks to preclude argument or evidence about unidentified Class Representatives who violated Company policy and whose violations were discovered after their terminations. (Pl. Mem. 1-6). Although Plaintiffs fail to identify to whom they refer, affirmative defenses in the Fourth Amended Complaint show that the following are the individuals and the defenses concerning them:

- Karen Liggins (no longer a Class Representative witness) who violated Company policy by recording a telephone conversation with her Regional Director (Fourth Am. Comp. Affirmative Defense ("Aff. Def.") ¶ 14 (Docket No. 56)).
- Jennifer Waxman Recht (a testifying Class Representative witness) who committed the same offense with her District Manager. (Fourth Am. Comp. Aff. Def. ¶ 15.)
- Maryann Jacoby (no longer testifying but a Class Representative) recorded a telephone conversation with her colleagues and manager without disclosing same to the participants. (Fourth Am. Comp. Aff. Def. ¶ 16).
- Kelly Corbett (a testifying class representative) who disclosed the Company's proprietary information to a prospective Novartis hire. (Fourth Am. Comp. Aff. Def. ¶ 17).

B. **Argument**

Plaintiffs assert that they offered to stipulate as to the limits on these Class Representatives' recovery and that Defendant did not accept it. (Pl. Mem. 2, 5). To Novartis' counsel's knowledge, this assertion is simply wrong. Individually and collectively, Novartis counsel recall no such offer and Plaintiffs produce no evidence of it.

Nevertheless, Novartis accepts the stipulation now offered with respect to damages only. It does not agree to forego the use of this evidence by way of impeaching the credibility of the

two remaining testifying Class Representatives to whom Plaintiffs' Motion applies – Mss. Waxman-Recht and Corbett. Both indisputably engaged in serious wrongdoing while employed by Novartis. From the affirmative defenses themselves, it is clear that such misconduct was in the context of some of the very issues in dispute. For example, Ms. Recht's recording was apparently made in anticipation of suing Novartis or building a case against it and in defending herself from discipline. (Fourth Am. Comp. ¶ 15; FED. R. EVID. 401, 608(b), 611(b).)

The Second Circuit's ruling in *Vichare v. AMBAC, Inc.* is particularly instructive. 106 F.3d 457 (2d Cir. 1996). As here (Pl. Mem. 4), the plaintiff in *Vichare* argued that *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) precluded defendant from presenting after-acquired evidence during the liability phase of trial. *Vichare*, 106 F.3d at 467-68. The Court of Appeals rejected that argument, concluding that "*McKennon* did not establish a rule of inadmissibility: the Court held on issues of liability and damages, not evidence." *Id.* at 468. The Court further found that the question of plaintiff's credibility was essential to the case and therefore the trial court did not abuse its discretion in allowing the defendant to cross-examine plaintiff on after-acquired evidence. *Id.* .

For the same reasons cited in *Vichare*, Plaintiffs Motion should be denied.

Dated: Chicago, Illinois.
February 3, 2010

Respectfully submitted,

By: /s/ Richard H. Schnadig

Richard H. Schnadig, Esq. 02495384

Thomas G. Abram, Esq. 00004405

Aaron R. Gelb, Esq. 06230930

Sara J. Kagay, Esq. 06286528

Elizabeth N. Hall, Esq. 06286976

Vedder Price P.C.

222 North LaSalle Street, Suite 2600

Chicago, Illinois 60601-1003

(312) 609-7500

(312) 609-5005

Jonathan A. Wexler

Vedder Price P.C.

1633 Broadway

47th Floor

New York, New York 10019

Telephone: (212) 407-7700

Fax: (212) 407-7799

Attorneys for Defendant

NOVARTIS PHARMACEUTICALS

CORPORATION

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true and correct copy of the foregoing STATEMENT IN OPPOSITION was filed electronically and served on the following by depositing same in the United States mail, with proper first-class postage prepaid, on February 3, 2010:

David Sanford
Katherine Kimpel
Katherine Leong
Felicia Medina
SANFORD, WITTELS & HEISLER, LLP
1666 Connecticut Avenue, N.W., Suite 310
Washington, DC 20009

Steven Wittels
Jeremy Heisler
SANFORD, WITTELS & HEISLER, LLP
1350 Avenue of the Americas, 31st Floor
New York, NY 10019

Grant Morris
LAW OFFICES OF GRANT E. MORRIS, ESQ.
1666 Connecticut Avenue, N.W., Suite 310
Washington, DC 20009

/s/ Richard H. Schnadig

Richard H. Schnadig